

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

DARRYL GUMM,

Petitioner, : Case No. 1:98cv838  
-vs- : District Judge Walter Herbert Rice  
Respondent. : Chief Magistrate Judge Michael R. Merz

BETTY MITCHELL, Warden,

Respondent.

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**ORDER RESTORING CASE TO ACTIVE DOCKET *NUNC PRO TUNC***

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On January 7, 2003, this Court granted Petitioner's motion and ordered this case stayed and held in abeyance pending exhaustion in the state courts of Petitioner's claim that he is mentally retarded and consequently ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002)(Doc. No. 126). On September 30, 2003, Chief Judge Rice found this case suitable for administrative processing, which resulted in its termination on the Court's docket (Doc. No. 134).

The United States Supreme Court recently found that district courts have authority to grant stays in habeas corpus cases to permit exhaustion of state court remedies in consideration of the AEDPA's preference for state court initial resolution of claims. *Rhines v. Weber*, 541 U.S. \_\_\_, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). It also directed district courts to place reasonable time limits on the petitioner's trip to state court and back. The Court thus endorsed the approach this Court had been following under *Palmer v. Carlton*, 276 F. 3<sup>rd</sup> 377 (6<sup>th</sup> Cir. 2002), but the endorsement implicitly requires district courts to continuously monitor the progress of the claims

in the state court process to ensure that the abeyance order is not being used to undermine the purpose of the AEDPA to expedite consideration of these cases. This Court has in fact continuously monitored the progress of this case in the state courts, as it does with all habeas corpus cases held in abeyance pending exhaustion.

Given this Court's obligation to engage in that monitoring, it is inappropriate to have the case terminated on the docket. Accordingly, with express permission of Judge Rice, the Order for administrative processing is vacated, *nunc pro tunc* October 1, 2003.

This case remains stayed pending the outcome of the state court proceedings.

August 26, 2005.

s/ **Michael R. Merz**  
Chief United States Magistrate Judge